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No. 01-714

IN THE

Supreme Court of the United States

UTAH, *et al.*,

Appellants,

v.

DONALD L. EVANS, SECRETARY OF COMMERCE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

BRIEF *AMICUS CURIAE* OF BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW IN SUPPORT OF APPELLEES

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INTEREST OF THE *AMICUS CURIAE*

The Brennan Center for Justice at New York University School of Law unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. The Center's mission is to develop and implement an innovative, nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms. In recognition of the ideal of equal representation expressed in Justice William J. Brennan, Jr.'s opinions for the Court in numerous voting rights cases, including *Baker v. Carr*, 369 U.S. 186 (1962), the Center has previously filed briefs *amicus curiae* with this Court in *United States Department of Commerce v. United States House of Representatives* and *Hunt v. Cromartie*. The Center takes an interest in this case because the decennial counting of the population provides the data critical to ensuring that groups and states achieve an equal voice through apportionment of the House of Representatives. With this brief *amicus curiae* in support of Appellees, the Center argues that the goal of equal and accurate representation is synonymous with the constitutional command of an "actual enumeration."[1] *Amicus* urges this Court to reject an interpretation of the Constitution that forever precludes the Census Bureau from using all tools at its disposal accurately to count the population and that therefore ensures that systematic biases in the headcount will continue to be reflected through misrepresentation in Congress.

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[1] *Amicus* files this brief with the consent of all parties. Letters of consent are on file with this Court. Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *Amicus*, contributed monetarily to the preparation and submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

At the beginning of each decade since the ratification of the Constitution, a national census has described the growth and evolution of the changing American population. As the population has changed, so have the tools used to measure it. In the first censuses, marshals riding on horseback between distant houses tabulated whole households on forms of their own making, used separate forms to tabulate slaves and "free inhabitants," registered race as "White" or "Colored", and categorized people as "deaf and dumb, blind, insane, idiotic, a pauper or a convict." Margo J. Anderson, *The American Census: A Social History* 14, 37, 44 (1988). In so many ways, the 2000 census would be unrecognizable to those original marshals. The thread that connects the censuses of then and now is a single-minded dedication to achieving an accurate count of the population.

The use of imputation in the last five censuses is just one of many techniques Congress has authorized to increase the accuracy of the count. After performing a "Dress Rehearsal" for the 2000 census and updating the hundreds of millions of addresses in its Master Address File, the Census Bureau embarked on a complicated and continuously evolving strategy of counting every member of the U.S. population, living at home or abroad, in traditional housing or on the streets, or in one of dozens of special circumstances for which the Census Bureau has a particular operation. *See* U.S. Census Bureau, *2000 Operational Plan* (2000), *available at* http://www.census.gov/dmd/www/pdf/Operational2000.pdf. In addition to using the mail to deliver and to retrieve census forms (as has been done since 1970), the Bureau made Census 2000 forms available in certain public locations, and on the World Wide

Web, and had enumerators return up to six times to non-responding residences. For some, responses were taken over the phone and, for the first time, through the internet. Most forms in the 2000 census were then counted by computers with state-of-the-art handwriting recognition technology, and "matching software" was employed to eliminate the millions of duplicate responses that the census received. *See* Pub. Info. Office, U.S. Census Bureau, *Digital "Capture" of Forms* (last revised Jan. 28, 2002), *at* http://www.census.gov/dmd/www/digital2.html; Pub. Info. Office, U.S. Census Bureau, *"Matching" Software* (last revised Jan. 28, 2002), *at* http://www.census.gov/dmd/www/matching2.html.

For addresses for which the census had no information or incomplete information as to the household's size, occupancy, or status, values were sometimes imputed based on information gained from nearby and similar households. At its core, the imputation process was much like the procedures followed in the earliest censuses, when a neighbor would give information about the house next door if its occupant was nowhere to be found, heads of households would give information about all who dwelled within, and slaveowners would estimate the number of slaves on their plantations. The various forms of imputation used in the 2000 census and its predecessors represent only the most modern attempt to use information gained from one respondent to better enumerate the entire population.

For the two states competing for the last seat in the House of Representatives, 0.25% of Utah's and 0.42% of North Carolina's population was imputed. *See* Memorandum from Donna Kostanich, Assistant Division Chief, Sampling and Estimation, Bureau of the Census, to Howard Hogan, Chief, Decennial Statistical Studies Div., Bureau of the Census 14 (Feb. 28, 2001), *available at* http://www.census.gov/dmd/www/pdf/Fr17.pdf. Neither

state exhibited a particularly high rate of imputation. The 1,172,144 people imputed into the 2000 census represent only 0.42% of the total U.S. population. The percent of each state's population that was imputed varied from a high of 1.12% (New Mexico) to a low of 0.17% (Iowa). *Id.* Although both states competing for the last seat in the House exhibited relatively low rates of imputation, the difference between the two was sufficient to award the additional representative to North Carolina instead of Utah. No one could have predicted that imputation would make the difference. In fact, in the 1990 census, North Carolina's rate of imputation (0.01%) was among the lowest, while Utah's (0.11%) was among the highest. *See id.*

On the eve of congressional primary elections in the already redrawn House districts in the two states, Appellants now seek from this Court a ruling that the reapportionment data for the 2000 census and its four predecessors was illegally and unconstitutionally constructed. Reading the apportionment clauses of Article I, section 2, and the Fourteenth Amendment, U.S. Const. art I, § 2, cl. 3; *id.* amend. XIV, § 2, to prevent the use of any statistical methods using the headcount data to achieve a more accurate count of the population, Appellants would have this Court read the words "actual enumeration" and "respective numbers" to turn back the clock at least 40 years on procedures, such as imputation, used to construct the apportionment totals. *See* U.S. Census Bureau, *1960 Censuses of Population and Housing: Procedural History* 81-84 (1966) (describing imputation in 1960 census). In fact, Appellants' interpretation runs counter to census practices established as early as 1790, as its notion of a headcount that "reckons singly" the population mischaracterizes the practice of even the first census.

For Appellants to succeed, not only do they need to reread "actual enumeration" as a headcount, they must also

convince this Court that "respective numbers" can actually mean a knowingly inaccurate count of a state's population and that apportionment "according to" such numbers cannot benefit from the added information imputation provides. Moreover, they must prove that Congress's powers to direct the "manner" of making the actual enumeration and to enforce the Fourteenth Amendment categorically prohibit it from using imputation in any way to calculate the apportionment totals. What Appellants seek is both unprecedented and inconsistent with the original understanding of the Constitution.

This Court has never read the Constitution to cabin Congress in its efforts to achieve an accurate count, and it has never ordered a recalculation of apportionment totals. This Court has required only that the "Secretary's conduct of the census be 'consistent with the constitutional language and constitutional goal of equal representation'" and that it "bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." *Wisconsin v. New York*, 517 U.S. 1, 19 (1996) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992)). Describing the Constitution as "vest[ing] Congress with virtually unlimited discretion in conducting the decennial 'actual enumeration,'" *id.* at 19 (footnote omitted), this Court has rightly accorded Congress and the Census Bureau broad deference based on the complexity, enormity, and fast-paced challenges that each census presents. This deference is also particularly appropriate in this case given the *post hoc* nature of the challenge to census procedures and the havoc a decision in Appellants' favor would wreak in North Carolina's upcoming congressional elections.

Appellants' reading is also inconsistent with the original understanding of the Constitution. By choosing the words "actual enumeration" the Framers sought merely to

ensure that apportionment totals would be based on a census. Indeed, in limiting the taxing power, Article I itself uses the words "census or enumeration" together, in section 9, to further clarify that the two concepts are identical. U.S. Const. art. I, § 9, cl. 4. Finally, the fact that the Constitution describes the "actual enumeration" as something that is "made" rather than a process that is conducted removes all doubt that the phrase somehow restricts Congress in the manner it can direct to achieve the apportionment totals.

In constitutionally linking apportionment to an accurate count of the population, instead of leaving the decision up to future Congresses, the Framers sought to avoid political manipulation and a system of rotten boroughs such as that experienced under English control. By using the phrase "actual enumeration," the Framers rejected conjectures and estimates based on data unrelated to a census. They did not seek to hamstring future Congresses from using all the tools at their disposal to achieve as accurate a count of each state's population as possible.

ARGUMENT

I. The Constitution Affirmatively Encourages, Rather Than Prevents, the Use of Imputation to Improve the Accuracy of State Population Totals Used for Congressional Apportionment.

A. The Text and Structure of the Constitution Reject the Notion That Congress Must Apportion Representatives Based on Inaccurate Data.

The requirement in the Census Clause of Article I, Section 2, as amended by the Fourteenth Amendment, that "Representatives and direct Taxes shall be apportioned

among the several States . . . according to their respective Numbers," does not prevent the census from using methods, such as imputation, that will make such "Numbers" more accurate. The mandate of an "actual enumeration," which produces the numbers employed to determine apportionment, merely requires the taking of a census, nothing more. The use of supplementary statistical methods, such as imputation, to improve the accuracy of the information garnered from census forms and enumerator interviews is true to both the letter and spirit of the Census Clause. Congress's authority under Article I, section 2, to determine the "manner" of "mak[ing]" the enumeration and its authority to enforce section 2 of the Fourteenth Amendment include the power to authorize imputation to fulfill the constitutional goal of equal representation.

Appellants' restrictive reading of the phrase "actual enumeration" as limited to a particular process of counting heads is inconsistent with the structure and text of the Constitution. To begin with the very sentence in which the words appear, the "actual enumeration" is a product that is "made," not a process that is conducted. The enumeration represents achievement of a specific goal: identification of the "respective Numbers" of the states. In "direct[ing]" the "manner" of making the "actual enumeration," Congress would be derelict in its constitutional duty if it adopted a method that it knows will misrepresent the respective number of people in each state. At the very least, the Constitution does not *obligate* Congress, as Appellants suggest, to conduct the census and to create the enumeration in such a way that apportionment will necessarily fail to be "according to [the states'] respective numbers."

Even conceding for the moment that "actual enumeration" refers to a process synonymous with a "headcount," the requirement that apportionment be made "according to" the "actual enumeration" does not prevent

the use of imputation to supplement and to refine the headcount numbers. The Clause does not require a one-to-one ratio of "enumerated population" to "number of representatives."[2] It requires merely that apportionment "agree with, correspond with or be suitable to," the respective numbers derived from the actual enumeration. Noah Webster, *American Dictionary of the English Language* (1828) (defining "according"); *see also Dep't of Commerce v. Montana*, 503 U.S. 442, 457 (1992) ("[T]he Government acknowledges that Congress has a judicially enforceable obligation to select an apportionment plan that is *related to* population."). It is undisputed that the size and location of the imputed population in the 2000 census are based on information acquired from enumerator interviews—that the apportionment totals using imputation, at the very least, "correspond with" the totals if imputed persons were subtracted.

Even if the Committee on Style's eventual choice of the words "actual enumeration" indicated a process, it did not mean anything more specific than conducting a census that counts each state's population. The Constitution itself, in Article I, section 9, uses the words together stating that "No . . . Tax shall be laid, unless in Proportion to the Census *or* Enumeration herein before directed to be taken" (emphasis added), suggesting that a rigid reading of the earlier phrasing in section 2 would be unwarranted. The Federalist Papers repeat the Census Clause almost word for word, but replace "actual enumeration" with the word "census" and whenever discussing the clause use the word census instead of enumeration. *See, e.g., The Federalist No.*

[2] Indeed, such a correlation would be impossible. Because the Constitution guaranteed even the most sparsely populated states at least one representative and because every state's population was not perfectly divisible by 30,000 (the original requirement for each seat in Congress), the relationship of people to seats was never one-to-one.

54, at 336 (James Madison) (Clinton Rossiter ed., 1961); *The Federalist No.* 55, at 343 (James Madison) (Clinton Rossiter ed., 1961); *The Federalist No.* 58, at 356 (James Madison) (Clinton Rossiter ed., 1961). Earlier drafts of this section of the Constitution, which used the word census, were consistent with this understanding.[3] If anything, the eventual choice of "actual enumeration" reflects views of the time, when the word "census" had a pejorative connotation, deriving from both the biblical story of the sin of David in numbering the people and the Latin link between the words census and censor, which was the Roman officer who "censured immoral behavior." Patricia Cline Cohen, *A Calculating People: The Spread of Numeracy in Early America* 35 (1999). As one historian posits, "this perhaps explains why English officials usually preferred to avoid the word 'census' and instead to talk about 'numberings' of the people." *Id.*

[3] *See* 1 *The Records of the Federal Convention of 1787*, at 589-90 (M. Farrand ed., 1966) [hereinafter Farrand]. An earlier version of this section read:

> Provided always that representation ought to be proportioned according to direct Taxation and in order to ascertain the alteration in the direct Taxation which may be required from time to time by the changes in the relative circumstances of the States — Resolved that a Census be taken within six years from the first meeting of the Legislature of the United States and once within the term of every Ten years afterwards of all the inhabitants of the United States in the manner and according to the ratio recommended by Congress . . . .

Id. at 590-91.

B. The Framers Did Not Intend the Census Clause to Restrict Congress's Ability to Achieve an Accurate Count of Each State's "Respective Numbers."

The Framers' intent behind the Census Clause was to achieve as accurate a count of each state's population as possible, not to freeze in 1790 the methods Congress could consider for a census 210 years later. In all of the debate over the Census Clause, it is curious to note the complete absence of any suggestion that only a certain method of achieving the actual enumeration would be permissible. Only through a selective reading of the constitutional debates and statements of the Framers can Appellants arrive at the conclusion that Congress must accept an inaccurate headcount as the basis of apportionment.

Amicus agrees with Appellants' suggestion that the Framers "fixed" a formula for apportionment. However, Appellants then read into this choice of a constitutionally prescribed apportionment formula a fixed standard for creating the "actual enumeration." The evidence from the convention and contemporaneous historical period argues against such a reading.

The debate over what later came to be Article I, Section 2, focused in large part on whether the Constitution should specify the basis for apportionment or whether each Congress could decide the apportionment formula anew. *See* 1 Farrand, *supra*, at 582-92. Quoting the concurrence in *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 344 (1999) (Scalia, J., concurring), Appellants note that the Framers feared leaving the basis of apportionment up to Congress because of the risk of political manipulation. Appellants' Br. at 47. However, by specifying that the census or "actual enumeration" should form the basis of apportionment, the Framers sought to reject the use of manipulable alternatives

to a census– namely, wealth, conjecture, or population estimates unrelated to a census–not alternative methods of conducting the census. Their choice of census-based population numbers as the materiel for apportionment totals derived not from a zeal for headcounts, but from a desire to have apportionment based on as fair and accurate a measure of population as possible.

An examination of the rejected alternatives for apportionment reveals the Framers' intent in adopting apportionment according to an "actual enumeration." First, the use of wealth was rejected not merely because it would require an estimate, as Appellants note, *see* Appellants' Br. at 42, but because it would be impossible to administer and because population itself could be used as a proxy for wealth. *See* Hyman Alterman, *Counting People: The Census in History* 184-85 (1969). The Framers considered wealth as a plausible basis for representation because they assumed that the metric used for apportionment would be the same as that used for taxation–taxation and representation being intertwined from the beginning of the Revolution until the final form of Article I, section 2 ("Representatives *and* direct taxes shall be apportioned among the several States . . . according to their respective numbers . . . ."). *See* 1 Farrand, *supra*, at 562 (stating that "taxation and Representation ought to go together"). The choice of population as the basis for representation and taxation derived, in large part, from the Framers' belief that population was, in fact, a *good estimate* of the wealth of a state.[4] The rejection of wealth in favor of population as the

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[4] *See* 1 Farrand, *supra*, at 593 ("Dr. Johnson, thought that wealth and population were the true, equitable rule of representation; but he conceived that these two principles resolved themselves into one; population being the best measure of wealth."); *id.* at 587 ("Mr. Ghorum. supported the propriety of establishing numbers as the rule. He said that in Massts. estimates had been taken in the different towns, and that persons had been curious enough to compare these estimates

sole criterion for calculating taxation and representation had little to do with the estimate-like nature of some possible wealth measure and much more to do with the Framers' determination that a census could serve as an accurate measure for both wealth and population. *See id.* at 579 (quoting Williamson's motion to consider "that in order to ascertain the alterations that may happen in the population & wealth of the several States, a census shall be taken") (internal quotation marks omitted). Moreover, the use of population as the formula for apportionment of both taxation and representation provided its own internal safeguard for avoiding manipulation. The requirement served to cabin manipulative tendencies by imposing costs in the form of taxation on any schemes to unfairly increase representation. *See The Federalist No.* 54, at 340 (James Madison) (Clinton Rossiter, ed. 1961).

Second, the Framers' choice of an "actual enumeration" distinguished future apportionment from the pure conjecture used to apportion the first Congress. *See* 1 Farrand, *supra*, at 578 ("[Mason] did not object to the conjectural ratio which was to prevail at the outset . . . ."); *id.* at 579 ("[T]he ratio fixt for the 1st. meeting was a mere conjecture."). Immediately following the Census Clause, the Constitution specifies how many representatives each state would have "until such enumeration shall be made." In choosing an actual enumeration as a basis for

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with the respective numbers of people; and it had been found . . . that the most exact proportion prevailed between numbers & property."); *id.* at 585 ("[Madison] could not agree that any substantial objection lay agst. fixing numbers for the perpetual standard of Representation. It was said that Representation & taxation were to go together; that taxation & wealth ought to go together, that population and wealth were not measures of each other. . . . He would admit that in no situation numbers of inhabitants were an accurate measure of wealth. He contended however that in the U. States it was sufficiently so for the object in contemplation.").

apportionment, the Framers ensured that apportionment of future congresses would not be the product of similar guesswork. The Framers knew that the conjectural, initial apportionment misrepresented the population of the states. *See id.* at 560 ("The Report is little more than a guess."). Indeed, to get the smaller states on board such initial misrepresentation was necessary. *See* Alterman, *supra*, at 189. This temporary solution or any conjectures like it would not become regularized, however. All future apportionment would be done according to the census with the goal of equal representation as its touchstone. George Mason's position entailed much more than the redacted quote Appellants cite. *See* Appellants' Br. at 4. According to Madison, "[Mason] did not object to the conjectural ratio which was to prevail in the outset; but considered a Revision from time to time according to some permanent & precise standard *as essential to ye. fair representation required in the 1st. branch.*" 1 Farrand, *supra*, at 578 (emphasis added). Like the other Framers, Mason viewed the governing goal of what would later become Article 1, section 2, to be "fair representation." The "actual enumeration" Congress would direct to be made was a vehicle for achieving this fair representation.

Finally, in specifying that the House would be apportioned according to an "actual enumeration" the Framers rejected estimates based on data other than a census. Such estimates were common throughout the colonies, often derived from tax lists, militia lists, or birth and death records. Thomas Jefferson's estimate of Virginia's population based on poll tax lists was one of the most prominent. *See* Alterman, *supra*, at 164-69; James H. Cassedy, *Demography in Early America: Beginnings of the Statistical Mind, 1600-1800*, at 225-41 (1969). The requirement of a national census provided a basis for apportionment totals that ensured distributive accuracy among the states and a consistent national system for

measuring population. This was in stark contrast to the practice under the Second Continental Congress and Articles of Confederation, when each state was responsible for its own census to apportion the costs of war. Few colonies (eventually states) rose to the task. *See id.* at 192-93. The cited statements from the Founders, *see* Appellants' Br. at 41-45, merely restate what is not disputed here–that they understood "census," "enumeration" and "returns" to mean something different than an "estimate" or "conjecture."[5] Appellants fail in their attempts to connect the imputation process from the last five censuses to the Founders' conception of "estimate" and "conjecture."

C. The History of Interpretations and Operations Under the Census Clause Supports the Use of Imputation to Achieve Accurate Apportionment Totals.

From the first census to the most recent one, Congress and census administrators have viewed accuracy and fair representation as its governing principles. To those ends, every census has departed from the rigid definition of

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[5] Although the Framers may have differentiated between the two, apparently those compiling the numbers from the 1810 census did not think the Census Clause prohibited estimates. The "Memoranda and Errata of the Census of the United States for the year 1810" describe how an estimate was used to remedy errors in the physical returns:

> An accidental examination of some of the returns led to the detection of material errors in the computation of the items of which their aggregates were formed. These were so great in one instance, to wit: North Carolina, as to cause the return to be transmitted to the marshal of that district for revision. It has been printed agreeably to his second *estimate*.

U.S. Dep't of State, *Aggregate Amount of Each Description of Persons within the United States of America and the Territories thereof, Agreeably to Actual Enumeration Made According to the Law, in the Year 1810* (1811), *reprinted in* U.S. Census Office, *Persons within the United States in 1810*, at 90 (1911) (emphasis added).

"actual enumeration" that Appellants propose here. The imputation processes conducted in the last five censuses are perfectly in line with procedures adopted in the previous 17.

To begin with, Appellants' conception of "actual enumeration" does not comport with the practice conducted in the first few censuses. Appellants define the phrase as "counting 'singly,' 'separately,' 'number by number,' 'distinctly.'" Appellants' Br. at 36 (quoting *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 347 (1999) (Scalia, J., concurring)). It is difficult to reconcile this definition and emphasis on singularity with the well-established practice in the first five censuses of counting households together. Until 1840, the marshals would count families together–putting only one name down on their makeshift census tabulation sheets and an aggregate number of household members of various categories. *See* Margo J. Anderson, *Encyclopedia of the U.S. Census* xi (2000); *see also* Margo J. Anderson, *The U.S. Census: A Social History* 39 (1988) (noting that the 1850 census identified slaves only by aggregate numbers according to slave owner, not by their own names). From the very beginning, the enumeration was not performed "separately" at all. Indeed, by relying on household heads to present information regarding the number and characteristics of their family members, tenants, and slaves, the census was never conducted on an individualized basis. The process of counting the population always involved information supplied by someone other than the enumerated person. Even today, the head of a household fills out the form on behalf of all who dwell there. The census does not require each person to be personally or singly enumerated.

The inconsistency of Appellants' definition with the historic practice of using a neighbor to give information on others in their neighborhood is particularly striking in this

case.[6] When enumerators confront a vacant household or someone who refuses to open a door, they do not then delete the record from the census or write in a zero. Rather, they use all means at their disposal to find out how many people live in the dwelling. Even the first Census Act embodied this commitment to use all information sources to make an incomplete enumeration "actual." It provided that enumerators would count absent people in the place where they normally lived. *See* Act of Mar. 1, 1790, ch. 2, § 5, 1 Stat. 101, 103 ("[E]very person occasionally absent at the time of the enumeration [shall be counted] as belonging to that place in which he usually resides in the United States."). In constructing even the first actual enumeration, therefore, the enumerator was required to count what Appellant describes as "phantom" persons. Appellants' Br. at 8-9.

The imputation process is constitutionally equivalent to these other established processes of using information from one individual to enumerate another. As Appellants accurately describe the process, for each imputation in the census there exists a corresponding "donor," which is "the estimated unit's geographically closest neighbor of the same type." Appellants' Br. at 7. Depending on its location in the data array of similar households, known as the hot-deck, the

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[6] The Census Act of 1919 described the duty of enumerators to use neighbors to get information from nearby housing units in the following way:

> It shall be the duty of each enumerator to visit personally each dwelling house in his subdivision, and each family therein . . . . [I]n case no person shall be found at the usual place of abode of such family . . . then it shall be lawful for the enumerator to obtain the required information as nearly as may be practicable from the family or families or person or persons living nearest to such place of abode who may be competent to answer such inquiries.

Act of Mar. 3, 1919, ch. 96, § 12, 40 Stat. 1291, 1296.

"donor" was either a vacant or occupied housing unit. For each case of imputation, however, the census used observed data to impute values for unobserved individuals, households, or addresses. For each class of imputations, the census needed to make a choice: should it ignore the information describing the occupancy characteristics of the unit or should it impute a value likely to make the aggregate apportionment totals more accurate? The judgment calls it made in favor of imputation were not arbitrary or capricious, but based on 40 years' experience using imputation in the apportionment totals and on a careful assessment of the available scientific evidence.[7]

Although each class of imputations (household size, occupancy, and status) raises distinct issues, all imputations in the 2000 census were based on information garnered through the physical enumeration or headcount process.

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[7] The scientific literature in support of imputation to achieve accuracy and reduce bias is voluminous. *See, e.g.*, S. Obeng-Manu Gyimah, *Missing Data in Quantitative Social Research* 10 (Population Studies Ctr., Univ. of W. Ontario, Discussion Paper No. 01-14, 2001), *at* http://www.ssc.uwo.ca/sociology/popstudies/dp/dp01-14.pdf (noting that the "hot deck imputation procedure [is] predominantly used by census bureaus the world over"); James W. McNally, *Generating Hot Deck Imputation Estimates: Using SAS for Simple and Multiple Imputation Allocation Routines* 2-3 (Population Studies & Training Ctr., Brown Univ., Working Paper #97-12, 1997), *at* http://www.pstc.brown.edu /papers/ wp-1997/97-12wp.html (describing the advantages of hot deck imputation, particularly with regard to mitigating non-response bias); Barry L. Ford, *An Overview of Hot-Deck Procedures*, *in* 2 *Incomplete Data in Sample Surveys* 185, 187-89 (William G. Madow, Ingram Olkin & Donald B. Rubin, eds., 1983) (describing advantages and disadvantages of using hot-deck imputation to avoid non-response bias); Innis G. Sande, *Hot-Deck Imputation Procedures*, *in* 3 *Incomplete Data in Sample Surveys*, *supra*, at 339 (same); *Discussion*, 3 *Incomplete Data in Sample Surveys*, *supra*, at 353, (quoting Frederick Scheuren of the Office of Research and Statistics of the Social Security Administration as saying "hot deck is a powerful tool in survey practice. . . . With large multipurpose surveys, the hot deck may be the best technique for use in imputing for item nonresponse.").

Household size imputation, which contributed the largest share (495,600 or 42%) of imputed persons to the 2000 census, is functionally similar to established and historic practices of asking neighbors for information on nonresponding housing units. *See* Fay F. Nash, U.S. Census Bureau, *ESCAP II: Analysis of Census Imputations* 2, 4 (Executive Steering Comm. for A.C.E. Policy II Report No. 21, 2001), *available at* http://www.census.gov/dmd/www/pdf/Report21.PDF (describing imputation process and results for the 2000 census). For this class of imputations, the Census Bureau records indicate that the unit is occupied, but for one reason or another, the number of occupants is unknown. Instead of recording the unit as vacant or nonexistent (*i.e.*, deleting the address or imputing a zero value that the Bureau knows to be incorrect), the Bureau uses information from the donor to calculate what it believes to be the most likely size of the household.

Appellants would have the census follow an alternative course. Based on their interpretation of the Census Clause, Appellants would have the census enumerators hear the voices behind a locked door, shut their ears, and deliberately pencil in a zero for the household. In other words, they would actively prevent the enumeration from being "actual," and instead have the census abide by a rigid rule that can be summarized only as "out of sight and out of mind." Even the most narrow reading of "actual enumeration" cannot possibly impose a *duty* on the Census Bureau to create an inaccuracy it knows can be prevented.

The occupancy and status imputations present somewhat different issues, but the constitutional obligation to make the enumeration as actual as possible remains just as strong. Occupancy imputations, which comprised 22% of all imputations and contributed 260,652 people to the 2000 census, were made when the Census Bureau could not verify that a housing unit was occupied. Status imputations, which

comprised 36% of all imputations and contributed 415,892 people to the 2000 census, were made when the Bureau had insufficient information about whether an "address represented a valid, non-duplicating housing unit." *See id.* at 1. The overwhelming majority of such imputations were the result of measures used to combat errors in the compilation of the Decennial Master Address File or in enumerator-completed questionnaires. *See id.* at 2-4 (describing the chain of events that led to status and occupancy enumerations); *cf. supra* note 5 (describing somewhat analogous processes used in 1810 census to remedy defects in physical returns).

As could be expected with any attempt to enumerate 280 million people in just a few short months, the 2000 census confronted administrative snafus, address file or enumerator errors, census forms crossing each other in the mail, late returns, blank returns submitted, duplicate returns, and a host of other expected, as well as unexpected, processing errors. In these cases, based on their experience, census administrators knew that a large number of these errors misrepresented *bona fide*, occupied housing units. Once again, they were confronted with the choice of doing nothing and acquiescing to erroneous enumerations and non-enumerations or using the tools at their disposal to correct the errors they suspected in the mailback, enumerator follow-up, and other procedures.

In a case of occupancy imputation, for example, an enumerator's count might show the housing unit as vacant, although person data (*e.g.*, number and race) are included on the questionnaire. The census used the imputation process to reconcile this conflict rather than discarding the data. Similarly, status imputation was often used when data records did not correspond to census ID numbers–for example, when census enumerators in the field added housing units not in the Master Address File. In fact, three

quarters of the housing units imputed through status imputation were added by enumerators or the respondents themselves. *See* Nash, *supra*, at 2. Appellants' suggestion that the imputed housing units were "phantoms" simply misrepresents what is involved in the imputation process.

Each of the three categories of imputation represents an established scientific method for achieving a more accurate count of each state's "respective numbers." Either the imputation process helps achieve an "actual enumeration" or, at the very least, it supplements the "actual enumeration" such that representatives can be constitutionally apportioned "according to" the imputation-enhanced population totals. In either case, the plan used in Census 2000, like its five predecessors, was well within the bounds of acceptable methods used to apportion Congress.

II. The Court Should Accord Its Traditional Deference to Congress in Directing the "Manner" of the Census.

Having always recognized the complexity in counting a population of hundreds of millions, this Court has never used the Census Clause to strike down a congressional decision to improve the accuracy of the apportionment totals. In an uninterrupted line of cases interpreting the Clause, this Court has wisely decided to avoid substituting its judgment for that of Congress and the Census Bureau in determining the manner of the census. *See Wisconsin v. New York*, 517 U.S. 1 (1996); *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Dep't of Commerce v. Montana*, 503 U.S. 442 (1992). The same deference is appropriate here.

Article I, section 2, clause 3 gives Congress broad power to choose the means of ascertaining an accurate count by specifying that the "actual enumeration shall be made . . .

in such Manner as they shall by Law direct." Section 5 of the Fourteenth Amendment adds to that power by giving Congress the "power to enforce, by appropriate legislation" the amended apportionment provisions of section 2 of that amendment. Eliminating the assignment of partial personhood to slaves in the three-fifths compromise of the original Constitution, section 2 does not speak of the census or actual enumeration, but mentions only apportionment "according to [the states'] respective numbers." Along with the Equal Protection Clause that precedes it, Section 2 further reinforces the goals of equal and fair representation based on an accurate count of the "whole number of persons in each state" and reemphasizes Congress's broad powers to achieve those goals.[8]

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[8] The debates surrounding the adoption of the Fourteenth Amendment make clear its emphasis on representation of the whole population. *See* Cong. Globe, 39th Cong., 1st Sess. 2766-67 (1866) (statements of Sen. Howard), *reprinted in The Reconstruction Amendments' Debates: The Legislative History and Contemporary Debates In Congress on the 13th, 14th, and 15th Amendments* 220-21 (Alfred Avins ed., 1967) (discussing a predecessor to the Fourteenth Amendment containing the same "counting" phrase); *id.* at 220 ("Its basis of representation is numbers, whether the numbers be white or black; that is, the whole population except untaxed Indians and persons excluded by the State laws for rebellion or other crime."); *id.* at 221 ("The committee adopted numbers as the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such, I think, after all, is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution."); *id.* ("And, sir, the true basis of representation is the whole population. It is not property, it is not education, for great abuses would arise from the adoption of one or the other of these two tests. Experience has shown that numbers and numbers only is the only true and safe basis; while nothing is clearer than that property qualifications and educational qualifications have an inevitable aristocratic tendency—a thing to be avoided.").

This Court has described the Constitution as "vest[ing] Congress with virtually unlimited discretion in conducting the decennial 'actual enumeration.'" *Wisconsin*, 517 U.S. at 19 (footnote omitted). "[S]o long as the Secretary's conduct of the census is 'consistent with the constitutional language and constitutional goal of equal representation,' it is within the limits of the Constitution." *Id.* (quoting *Franklin*, 505 U.S. at 804). Through the Census Act, Congress has delegated the power to the Secretary of Commerce to "take a decennial census of [the] population . . . in such form and content as he may determine . . . ." 13 U.S.C. § 141(a) (2001). In defending choices concerning the manner of conducting the census, the Secretary must demonstrate that his decisions "bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." *Wisconsin*, 517 U.S. at 19. The use of imputation in the 2000 census easily passes this deferential standard of review.

Appellants all but concede the consistency of imputation with the "constitutional goal of equal representation." Hoping to sweep under the rug this constitutional goal and the precedent that recognizes it, Appellants focus their argument instead on identifying alternative values to equality and accuracy, such as the importance of headcounts over estimations and the avoidance of political manipulation.

The false dichotomy between headcounts and imputation-aided enumerations was demonstrated above. To reiterate, the Constitution allows for imputations in the "ma[king]" of the "actual enumeration." Alternatively, even if one adopts a restrictive reading of "actual enumeration," imputation can be used to calculate the "respective numbers" of people in the several states. In any event, the broad congressional power to determine the "manner" of

conducting the "actual enumeration" suggests that the Framers recognized the need to unshackle Congress from any constitutionally enshrined method for taking the census. *Cf. Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring) ("Art. II, § 1, cl. 2 [which provides that 'Each State shall appoint, in such *Manner* as the Legislature thereof may direct, a Number of Electors'], 'convey[s] the broadest power of determination' and 'leaves it to the legislature exclusively to define the method' of appointment." (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1892)) (emphasis added)).

Although Appellants cannot find evidence of political manipulation through imputation in any of the last five censuses, they raise the spectre of such manipulation, and the Framers' fear of it, to confine the "manner" Congress may choose for the "actual enumeration." As mentioned above, the Framers made the political manipulation argument solely to justify fixing the apportionment process in the Constitution, not to prescribe the conduct of the census. Appellants' argument fails for a further reason, however, because imputation is less susceptible to manipulation than both the "estimates" Appellants confuse with it, and the headcount method they place on a constitutional pedestal.

As an initial matter, the last-minute nature of Appellants' expression of concern for imputation and the absence of any prior objection to the process reveal much about the potential for manipulation. Indeed, Appellants Senators Bennett and Hatch appear never to have used their legislative power even to suggest a halt to the use of imputation. Why Appellants discovered only a few months ago that the past 40 years of censuses and related apportionments have been unconstitutional is no mystery: *ex post* calculations indicate that subtracting imputations

will be enough to shift a congressional seat from North Carolina to Utah in the next Congress.

It cannot be stressed enough, however, that no one foresaw that North Carolina and Utah would be competing for the last seat or that imputation might make the difference. Soraya Sarhaddi Nelson, *Census May Net State Only 1 New House Seat*, L.A. Times, May 21, 2000, at A1 (presenting table of predicted changes in House delegations that includes neither Utah nor North Carolina among states likely to change); Rene Sanchez, *Population Increase Highest in Western States*, Wash. Post, Jan. 1, 1998, at A14 (not mentioning Utah and North Carolina in the 15 states whose House delegations might change with the 2000 census). Indeed, as noted previously, the situation in 1990 was just the reverse: Utah had a higher rate of imputation than North Carolina. *See* Memorandum from Donna Kostanich to Howard Hogan, *supra*, at 14 (noting North Carolina's 1990 rate of imputation (0.01%) was among the lowest, while Utah's (0.11%) was among the highest). Although every census presents new problems and issues, no one suggests that the imputation dynamics for the 2000 census were atypical. The rate of imputation was consistent with rates in 1970 and 1980, while 1990 remains somewhat of an outlier. (Hogan Decl. ¶¶ 52-57 J.A. 273-75.) However, like previous censuses, the partisan, regional, or state beneficiaries of the imputation process have not been consistent or predictable.

This lack of consistent beneficiaries and predictability are two features of imputation that distinguish it from statistical sampling as well as from the myriad "estimates" that were used for calculating population at the founding. Other key features constraining imputation-based manipulation are the centrality of a publicly available Decennial Master Address File derived from official sources (such as the Post Office) to the process and the use of the

"nearest neighbor" (*i.e.*, a geographic constraint) to attain a donor unit from the "hot-deck." Finally, the scientific and advisory boards that oversee the use of imputation in the census and the exhaustive public disclosure, comment, and criticism of each aspect of the census operational plan ensure that the method used will be one arrived at with significant input from the scientific community. *See* Kenneth Prewitt, *The U.S. Decennial Census: Political Questions, Scientific Answers*, 26 Population & Dev. Rev. 14 (2000) (describing the census oversight panel of the National Academy of Sciences and other scientific advisory boards).

When it comes to the potential for manipulation, the true burden of proof lies with Appellants, who must show how their interpretation of an "actual enumeration" unmoored from any requirement of accuracy would be immune to manipulation. Appellants' suggestion that imputation could be manipulated through a reduction in resources for Non-Response Follow Up or through addition or subtraction of addresses from the Master Address File, Appellants' Br. at 43 n.12, is outright bizarre: the same strategy would be even more likely and successful in an "actual enumeration" as Appellants envision it. Nothing about the headcount method prevents the Census from directing enumerators to certain locations but not others or focusing its resources on actually enumerating some agent's preferred population. Indeed, when the constitutional goals of accuracy and fair representation are subordinated to a preoccupation with headcounts, nothing prevents the Census from discarding the Master Address File altogether and just leaving it up to enumerators to roam the streets and backcountry in search of heads to count, as they did in 1790.

Even if Appellants could demonstrate some risk of manipulation from imputation, it would never be as great as other aspects of the calculation of apportionment totals that

are clearly constitutional. First, the imputation process is not nearly as manipulable or significant as the choices among various apportionment formulas and ways of dealing with remainders—a choice this Court has deemed well within Congress's constitutional authority. *See Dep't of Commerce v. Montana*, 503 U.S. 442 (1992). *See generally* Lawrence R. Ernst, U.S. Census Bureau, *Apportionment Methods for the House of Representatives and the Court Challenges* (1992), *available at* http://www.census.gov/srd/byyear/html. Second, the census totals could be manipulated by the date and length of time allotted for conducting the census, the language of the census forms,[9] the process of distribution of census forms (*i.e.*, through mail-out mailback, or through so-called coverage improvement programs in local post offices, *etc.*), and the breadth and intensity of the enumerator follow-up procedures (assuming such follow-up happens at all). Finally, Congress and the Census Bureau have broad discretion to determine whom to count toward the apportionment totals and where to count them. They can decide whether and where to count illegal aliens and decide in which state, if any, members of the military or other Americans living abroad should be counted. *Cf. Utah v. Evans*, 143 F. Supp. 2d 1290 (D. Utah) (three-judge court), *aff'd*, 122 S. Ct. 612 (2001) (rejecting argument that the census should count LDS missionaries as it counts members of the military).

The Constitution leaves these decisions and many others that could lead to manipulation of apportionment totals to the discretion of Congress in determining the manner of creating the "actual enumeration." The Census

[9] Census 2000 forms were mailed out only in English. Respondents needed to request a form in a different language. *See* U.S. Census Bureau, *Census 2000 Language Program* (Feb. 29, 2000), *available at* http://www.census.gov/dmd/www/pdf/Langpro.pdf.

Clauses accord such flexibility to Congress because the census is an enormously complex and expensive undertaking that must be completed in just a few months; it requires adaptation every 10 years as well as a series of administrative judgment calls to deal with new problems as they arise. Census 2000 was described by many as the "largest peacetime mobilization in our nation." Secretary of Commerce William M. Daley, Prepared Statement Before the Committee on Governmental Affairs, United States Senate (Mar. 11, 1997), *at* http://www.ogc.doc.gov/ogc/legreg/testimon/daley.051/censuswd.htm. Its seven-year-old operational plan had to be completely and quickly reworked to comply with this Court's decision in *House of Representatives*, and once the forms were distributed and enumerators were in the field, Bureau officials needed to make immediate decisions to counteract arising problems, such as statements by elected officials discouraging people from filling out their census forms. *See* Judith Graham, *Lawmaker Sees Big Brother in Census Form: Oklahoma Congressman Finds Many Share His Suspicions of Intrusion by the Government*, Chi. Trib., June 25, 2000, at C4 (quoting congressman critical of the census); Steven A. Holmes, *Low Response To Long Form Causes Worry About Census*, N.Y. Times, Apr. 7, 2000, at A21 (citing statements by candidates and officeholders suggesting some questions on the census could be ignored). Each one of the choices the Bureau made en route to and during the 2000 census, however, grew from its single-minded determination to achieve the most accurate count of the nation's population and hence achieve the constitutional goal of fair and equal representation.

One can easily challenge any individual judgment call or component of the operational plan. Indeed, in retrospect, Bureau officials always realize they should have done some things differently in a particular aspect of the operation. But it is the flexibility embodied in the Census

Clauses themselves that will allow the Bureau to learn from its mistakes and allow Congress and the Bureau to make each successive census more accurate than its predecessor.

The context of this case highlights an additional reason to be cautious in constraining the manner Congress may choose for conducting the "actual enumeration." The time period between the release of census data and the redistricting of congressional and other legislative seats is short and filled with political wrangling. Allowing eleventh-hour challenges based on post hoc realizations would seriously undermine the electoral processes of states that have already drawn their congressional districts based on the apportionment totals.

The effect of an adverse ruling here on North Carolina underscores the importance of the Court's traditional deference to Congress's direction of the manner in creating the enumeration and calculating apportionment totals. In short, a decision in favor of Appellants would create a logistical nightmare for the state of North Carolina. When the Court hears this case, the filing deadline will have already passed for North Carolina's May 7, 2002, primary elections in the 13 congressional districts the state assumes it will retain in the 2002 elections. If North Carolina is forced to go back to the drawing board on its congressional districts, the congressional campaign will be truncated, if it happens at all.

As this Court knows all too well, North Carolina is subject to the preclearance procedures of Section Five of the Voting Rights Act, 42 U.S.C. § 1973c § 5 (2001), and its congressional redistricting plans have spawned more Supreme Court litigation in the past decade than any other state. *See Easley v. Cromartie*, 532 U.S. 234, *reh'g denied*, 532 U.S. 1076 (2001); *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Shaw v. Reno*,

509 U.S. 630 (1993). A decision in favor of Appellants would likely force North Carolina to redraw its districts sometime in the early summer. Assuming the best of circumstances—that the Attorney General grants preclearance to the first plan submitted and does so with unprecedented speed—the preclearance process would allow the new districting plan to become law in the early fall. In the space of approximately two months, North Carolina would need to reopen and administer its candidate filing and qualification procedures, oversee a primary campaign and election, and oversee a general campaign and election. Such a schedule does not even make allowance for the inevitable litigation that has become as much a part of North Carolina's selection of its congressmen as the elections themselves.

CONCLUSION

"As one season follows another, the decennial census has again generated a number of reapportionment controversies." *Franklin v. Massachusetts*, 505 U.S. 788, 791 (1992). As with every other constitutional challenge ever made to the apportionment of House seats, the Court should reject Appellants' invitation to recalculate the population according to their preferred formula. The text, history, and original intent relating to the creation of the actual enumeration strongly counsel against the establishment of a new constitutional rule that straitjackets Congress in determining the manner of achieving a complete count of the population. The destabilizing political consequences that would follow a ruling in Appellants' favor here further reveal the wisdom in the Framers' model for determining the apportionment of representatives among states according to their respective numbers.

This Court should therefore affirm the opinion of the U.S. District Court for the District of Utah.

Respectfully submitted,

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